Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES OF AMERICA

NO . . . 79-1151
OCTOBER TERM, 1979

RICHARD LLOYD ELLIS,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

No.....

October Term, 1979

RICHARD LLOYD ELLIS,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Comes now the petitioner, Richard Lloyd Ellis, by his attorney Roger S. Hanson, member of the bar of the United States Supreme Court, asking for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, to review that certain opinion, **United States v. Ellis,** _____ **F.** 2d _____ (9th Cir. 1979), a copy of

which is herewith attached to this petition for certiorari.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioners submit the following:

(a)

OPINION BELOW

The official report of the judgment herein sought review is **United States v. Ellis,** _____ **F.** 2d _____ (9th Cir. 1979), dated Dec. 26, 1979. A copy of that opinion is attached as Appendix "A".

No petition for rehearing and suggestion for hearing **en banc** was made to the U.S. 9th Circuit.

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) the opinion affirming petitioner's conviction was entered December 26, 1979.

(ii) no rehearing and suggestion for hearing **en banc** was made to the U.S. 9th Circuit.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1254 (d):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:(d) By Writ of Certiorari granted upon the petition of any party to any civil or criminal

case, before or after rendition of judgement or decree..."

Jurisdiction of this Honorable Court is further invoked because:

The U.S. Court of Appeals for the 9th Circuit has erroneously extended the concept of "functional equivalent of the border" to include a stop of land vehicles some 400 miles from the U.S.—Mexican border in Kern County, California, where said land vehicles have been seen to merely **contact** an aircraft which has never been known to have ever landed in Mexico

(c)

QUESTIONS PRESENTED FOR REVIEW

ISSUES AND QUESTIONS ON APPEAL

(1.) Given the following facts, can the halting and arrest at gun point of the occupant of a van be justified as a so-called Customs Search?:

(a) An airplane is noted approaching the United States at 100 knots, the initial observation of the plane being some 27 miles South of the United States-Mexican Border.

(b) Nothing suggested or supported that the aircraft had ever landed or contacted the Republic of Mexico, and no evidence whatsoever exists to support that it then contained contraband.

(c) The plane was flying without lights and landed

at a dirt airtstrip used by crop dusters in Kings County, California.

(d) As the plane landed, it was observed by a United States Customs plane flying overhead that had been summoned to follow it on its Northernly course toward California; two (2) vans approached the plane and remained some 15 minutes and the airplane took off and the vans left. **Nothing was seen to have been transferred from the plane to the vans.**

(e) The situs of aircraft-van contact was some 400 miles from Mexico and some 100 miles inland from the Pacific Ocean.

(f) No evidence existed to indicate that two (2) vans had ever been close to or near the United States-Mexican Border, and no evidence existed to show that they contained contraband when halted and the drivers arrested at gun point.

Thus, where nothing indicates that the two (2) vans have been close to the Mexican-United States Border, can there be a valid non-probable cause "Customs Search" on the mere fact there has been an observed, within the United States, ground contact between the vans and an airplane which has been observed **in the air** over Mexico, but which had no observable contact with Mexico?

2. Given the foregoing facts, was there probable cause to effect an arrest of the occupant of a van on the reasonable belief that it was then a respository of some sort of contraband?

3. Did the detention of the arrestee Ellis, petitioner herein constitute unreasonable conduct on the part of the state law enforcement, thus making unreasonable the search of the camper van conducted some 35 to 50 minutes later?

4. Did the arrest at gun point of Petitioner Ellis constitute an arrest that must be tested by probable cause rather than an investigatory stop based on a founded suspicion that the van then contained contraband?

5. Did the arrest of Petitioner Ellis violate the general reasoning of **Whitely v. Warden Wyoming Penitentiary, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031**, inasmuch as Kern County Deputy Sheriff Casillas had no personal information whatsoever concerning the nature of the crime that Petitioner Ellis had allegedly committed nor did he have information to support a belief that the van then contained contraband?

6. Where Deputy Sheriff Casillas testified under oath initially that he did not "arrest Petitioner Ellis for possession of marijuana," merely detaining him at gun point for 35 to 50 minutes until back up Sheriffs and a United States Customs Agent arrived did he commit perjury when called by the United States Attorney to later state that the van reeked with marijuana smell, thus nullifying the integrity of his entire testimony?

7. Can two (2) vans be stopped searched under a

theory of "Customs Search" where not one scintilla of evidence existed to indicate that they had ever been near, close to, or across the United States-Mexican Border?

8. Can the United States Government establish the accuracy of rader equipment without calling experts familiar with the equipment, within the meaning of **United States v. Dioguardi**, 428 F. 2d 1033 (2d Cir. 1970); **United States v. Cepeda-Penes**, 577 F. 2d 754 (1st Cir. 1978); **United States v. Oates**, 560 F. 2d 45 (2d Cir. 1977); **United States v. Ruffin**, 575 2d 346 (2nd Cir. 1977), where defense challenge is made to the accuracy of the equipment in establishing that an airplane is sighted 27 miles **South** of the United States-Mexican Border, and where, were it not established that said airplane had been across the Border, (although solely airborne, never on the ground) there could be no legitmate United States Customs interest or concern in the aircraft, within the Confrontation Clause of the United States Constitution's Sixth (6th) Amendment?

9. Whether the United States Customs Service can attempt to deputize Kern County Sheriffs some 300 miles from the United States-Mexican Border to act as surrogate customs officers to arrest and detain Petitioner Ellis for 45 minutes-1hour while Customs Officers arrived on the scene?

(d)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

FOURTH AMENDMENT

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(e)

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

SUMMARY STATEMENT OF THE CASE

Rodney Moore, a radar operator at the "Los Angeles" Center in **Lancaster, California,** detected a moving aircraft some 27 miles south of the United States-Mexican border heading north toward California. Being employed by the United States Customs Service, he radioed his contact to a United States Customs plane, "Lema 221", airborne in the Palm Springs-Banning area. Following vector methods, the customs plane was able to locate and

make contact within a few miles of the unknown craft, and the two (2) planes proceeded northerly into the United States where the unknown craft was observed to land on an unlighted airstrip in Kings County, California. Two land vehicles were seen, via infra red equipment, to meet the airplane and remain for some fifteen (15) minutes, and the plane then took off and the vehicles departed. **Nothing** was observed to be transferred from the plane to the ground vehicles. No information existed to support that the plane contained contraband, nor was there any evidence that it had ever landed in Mexico. It entered the United States without lights and in violation of failing to stop and check in with United States Customs, yet nothing existed to prove that its lights were not malfunctioning when it was flying across the border.

By this time several different state law enforcement groups were alerted concerning the scenario, including the California Highway Patrol, the Kern County Sheriffs, and the Kings County Sheriffs, as well as United States Customs Officers from as far away as San Francisco; the latter, one Gould, travelled at high speed via car from **San Francisco** to **Fresno** to participate in the investigation.

Via airborne customs plane, the ground-air radio contact was continued, and observations were relayed to the ground vehicles of various law enforcement groups.

Petitioner ELLIS and Co-Defendant TARKINGTON were the drivers of the two (2) land vehicles felt to have been the ones who had met the aircraft when it had landed in Kings County,California.

Via radio, one **Casillas**, a King County Deputy Sheriff, was ordered to halt both vehicles, although **Casillas** did not know then any concrete information which would lead him to believe that the drivers had committed a felony or any articuable felonies. He halted the vehicle driven by Petitioner ELLIS at gun point, ordered ELLIS from the vehicle, handcuffed him and locked ELLIS in his Kings County Sheriff vehicle until his commanding Sergeant arrived fifteen (15) minutes later. The two (2) sheriffs then awaited another twenty(20) minutes to one-half (1/2) hour while United States Customs Officer **Gould** arrived. During this entire 30-50 minute detention, ELLIS was never literally "arrested" for the officers then present believed that they did not have probable cause to arrest him. Anachronistically, and belatedly, upon recall, **Casillas** claimed that he, **Casillas**, could smell a strong and permeating aroma of marijuana emanating from ELLIS' vehicle. This highly unlikely story was juxtaposed upon his earlier statements at the suppression hearing that he felt that he did not have probable cause to arrest ELLIS. Over the vehement objections of Petitioner ELLIS, the camper was entered and searched and thirty-five (35) bags of

marijuana were located within it.

During the halt of Petitioner ELLIS' vehicle, the companion vehicle driven by Co-Defendant **Tarkington** escaped and was not halted until much later within the City limits of the Village of **Wasco**, California. Contained therein was marijuana.

Co-Defendant **Tarkington** entered a Plea of Guilty and was sentenced to a term of probation.

Petitioner ELLIS submitted his case on the transcript developed at the Suppression Motion, was found Guilty, and took a timely Appeal to the U.S. Ninth Circuit.

(f)

ARGUMENT

I

A STOPPING OF A MOTOR VEHICLE AT GUN POINT WITH A SUBSEQUENT HANDCUFFING OF THE OCCUPANT OF THE VEHICLE CAN NOT BE EQUATED WITH ANYTHING OTHER THAN AN **ARREST**, FOR WHICH PROBABLE CAUSE TO ARREST MUST BE AFFIRMATIVELY DEMONSTRATED. **UNITED STATES V. STRICKLER**, 490 F. 2d 378 (9TH CIR. 1974); THE HOLDING OF THE OCCUPANT AT GUN POINT FOR 35 TO 50 MINUTES TO AWAIT THE ARRIVAL OF OTHER OFFICERS CONSTITUTES AN

UNREASONABLE DETENTION AND MUST CONSTITUTE A FULL-FLEDGED ARREST AND NOT SOME SORT OF TEMPORARY DETENTION BASED ON A FOUNDED SUSPICION.

In **United States v. Strickler,** 490 F. 2d 378 (9th Cir. 1974) the U.S. 9th Circuit held at pages 379-380 that the halting of a land vehicle at gun point constitutes **arrest** of the occupants rather than a temporary stop for a brief investigation, and, indeed, many federal cases, exemplified by **United States v. Strickler,** 490 F. 2d 378, 379-380 (9th Cir. 1974) clearly provides that the halting of a vehicle or aircraft at gun point constitutes a full-fledged arrest for which probable cause for arrest must be demonstrated rather than some sort of temporary detention stop for brief interrorgation of the persons temporarily halted. As the Ninth (9th) Circuit held in **Strickler,** supra, at 379:

> "In **Adams v. Williams** (1972) 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612, the Supreme Court upheld the seizure of the occupant of a parked car based on less than probable cause.[1] The Court thus made explicit what had been merely implied in **Terry v. Ohio** (1968) 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889-forcible street encounters may be intiated by the police if "reasonable" within the meaning of the Fourth Amendment.[2] The Supreme Court, however also made it clear that the propriety of some forms of police conduct, even though they may be labeled "stops" or "investigory detentions" by the police, would continue to be evaluated under a probable cause standard. (See 407 U.S. at 145-146, 92 S. Ct. 1921, 32 L. Ed. 2d 612.)

1. To decide the case a bench, we need not prescribe precisely the point at which police action which detains a suspect ceases to be a nonarrest seizure and becomes an arrest; **for we simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the "brief stop of a suspicious individual in order to determine his identity or to maintain the statis quo momentarily while obtaining more information" which was authorized in Williams.** (407 U.S. at 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612.) The restriction of Stricklers "liberty of movement" was complete when he was encircled by the police and confronted with official orders made at gunpoint.

As in **Strickler, supra,** the Kern County Sheriff's Office has no previous knowledge that some sort of drug transactions had occurred on the day in question; no description of an airplane, no description of some sort of ground vehicle meeting it, no description of the persons involved. But it is abundantly clear that suspicion by the police that certain behavior equally commensurate with legitimate activity is seen as illegitimate behavior does **not** supply the missing ingredient to ripen into and arrest situation. **Strickler, supra,** provides at 380:

2. The constitutionality of the police conduct, therefore, depends upon whether at the moment the police surrounded Strickler's automobile and leveled a gun at him, the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believeing that Strickler had committed or was committing a criminal offense. (See **Beck v. Ohio** (1964) 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142; **Henry v. United States, supra,** 361 U.S. at 102, 80 S. Ct. 168, 4 L. Ed. 2d 134.)"

"The government failed to carry its burden of proving that probable cause to arrest existed. **Before his arrest, the police had no information which implicated Strickler in any way in the cocaine negotiations.**"

It is clear, however, that if the defendants do in fact seek to escape, the pulling of guns to attempt to halt an actually occurring escape does not convert a detention stop into an arrest situation. As noted by the United States Ninth (9th) Circuit in **U.S.A. v. Thompson, Reeve, Law & Harris**, 558 F.2d. 522, (9th Cir. 1977):

"(1,2) A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest. **United States v. Richards**, 500 F. 2d 1025, 1028-29 (9th Cir. 1974), cert. denied, 420 U.S. 924, 95 S. Ct. 1118, 43 L. Ed. 2d 393 (1975). See **United States v. Coades**, 549 F. 2d 1303, at 1305 (9th Cir. 1977); **United States v. Russell**, 546 F. 2d 839, 841 (9th Cir. 1976) (Wright J. concurring)".

Of course, assuming that the **detention** is valid (which of course it is not here because of being accompanied by the use of drawn weapons) a smell of marijuana when the officer is proximate to the aircraft

would support probable cause to arrest and/or search of the vehicle. **Chambers v. Maroney**, 399 U.S. 42. The arrest situation here occurred instantly with the use of the gun against the vehicle driven by Petitioner Ellis. As the Ninth (9th) Circuit has stated in **U.S. v. Thompson, Reeved, Law & Harris**, 558 F. 2d 522 (9th Cir. 1977) per Honorable Herbert Y.C. Choy:

"(3,4) After a brief period during which appellants were questioned, the officers detected a strong odor of marijuana coming from one of the vans. We have repeatedly held that, "If after valid investigatory stop probable cause arises, the search may then be made," **United States v. Bugarin-Casas**, 484 F. 2d 853 (9th Cir. 1973), cert. denied, 414 U.S. 1136, 94 S. Ct. 881, 38 L. Ed. 2d 762 (1974). See e.g., **United States v. Russell**, 546 F. 2d 839, 840 (9th Cir. 1976); **United States v. Bates**, 533 F. 2d 466, 468-69 (9th Cir. 1976); **United States v. Portillo-Reyes**, 529 F. 2d 844, 850 (9th Cir. 1975), cert. denied, 429 U.S. 899, 97 S. Ct. 267, 50 L. Ed. 2d (1976); **United States v. Rocha-Lopez**, 527 F. 2d 476, 478-79 (9th Cir. 1975) cert. denied, 425 U.S. 977, 96 S. Ct. 2181, 48 L. Ed. 2d 802 (1976); **United States v. Moreno-Buelna**, 524 F. 2d 1129, 1132 (9th Cir.) (Chambers J., concurring), cert. denied, 423 U.S. 1035, 96 S. Ct. 570, 46 L. Ed. 2d 410 (1975); **United States v. Rodriguez-Alvardo**, 5010 F. 2d 1063, 1064 (9th Cir. 1975). And the detection of marijuana odor

emanating from a vehicle has been held sufficient in such situation to give rise to probable cause to search. See **Russell, supra**, at 840, **United States v. Laird**, 511 F. 2d 1039, 1040 (9th Cir. 1975); **United States v. Ojeda-Rodriguez**, 502 F. 2d 560, 561 (9th Cir. 1974) cert. denied, 420 U.S. 910, 95 S. Ct. 830, 42 L. Ed. 2d 839 (1975); **Fernandez v. United States**, 321 F. 2d 283, 286-87 (9th Cir. 1963). (See footnote 1.) Appellants were placed under arrest only after the marijuana was discovered."

Of course **U.S.A. v. Thompson, et. al., supra**, is not authority for assertion that probable cause to search and arrest existed for the United States Ninth (9th) Circuit at footnote 1 specifically declined resolution of that matter upon their finding a pure detention stop:

"1. The district court also found that the officers had probable cause to search the vans even before the investigatory stop and the detection of marijuana odor. Given our disposition of the issues, we have no need to review that finding."

Of course, the pure detention stop must confine itself to a non-violent, non-gun drawn interrogation based solely on legitimate founded suspicion; if guns are used, an arrest is indicated.

In **United States v. Bugarin-Casas**, 484 F. 2d 853 (9th Cir. 1973), the distinguishing point is well taken and is well illustrated: the vehicle was halted on "founded suspicion" that because it "rode low" in the

rear, and because it had a compartment in which aliens might be concealed, it might then have an alien concealed in it. When officers approached it, they saw several packages via a floor board crack due to displaced floor board panels. Because of the officers intense experience with "kilo packages" of marijuana, an arrest was then affected based on the then developed probable cause. But it is clear that the initial halting was an "investigatory stop" and not an arrest as made clear in the 9th Circuit by **Strickler, supra**, and **Ramos-Zaragosa, supra.**

In **United States v. Larkin**, 510 F. 2d 13, 14 (9th Cir. 1974) the Ninth Circuit per Judges Hufstedler and Choy again affirmed that:

". . . a confrontation with a vehicular blockage and drawn weapons cannot be equated with an investigative detention. **(United States v. Strickler**, (9th Cir. 1974) 490 F. 2d 378)."

Plainly, if the halt of the vehicle driven by Petitioner can not be justified under some sort of "Customs Stop', then the scenario is a full-fledged arrest for which probable cause to arrest must be demonstrated; it can not be successfully argued that the halting of the vehicle was some variance of a "temporary detention" for questioning because in the 9th Circuit the halting of a vehicle at gun point and holding of the occupant under handcuff can not be other than an arrest.

Plainly, not one thing was known about the

subjuct aircraft-not that it had ever even **landed** in Mexico, let alone that it contained andy sort of contraband, although clearly surveilled from the air with sophisticated infra-red detection equipment which allowed a "light as day" view of the scene even though midnight darkness prevailed, not one thing was seen to have been transferred from the plane to the ground equipment. Hence, not one scintilla of fact existed to then show or support that the two ground vehicles then contained contraband to justify their halt by state law enforcement officers. It is plain that facts must exist to show that the vehicles then halted then at that time, contained contraband. **Chambers** v. **Maroney**, 399 U.S. 42, presents the type of factual knowledge requisite to the seizure and search of a vehicle on the open highways, and plainly such knowledge was here **zero**. In short, no probable cause existed to show that contraband then existed in the vehicles to justify their stop at gun point and lengthy, 45 minutes to 1 hour detention of Petitioner to attempt to categorize the ultimate search as some extended Customs Search. This conviction, therefore, must be reversed. This detention was clearly unreasonable and vitiated the entire scenario.

ARGUMENT

III

PETITIONER WAS DENIED HIS SIXTH (6th) AMENDMENT RIGHT OF

CONFRONTATION WHERE THE TRIAL COURT ERRONEOUSLY APPROVED THE GOVERNMENT'S FAILURE TO CALL THE FOUNDATIONAL EXPERTS TO ESTABLISH THE ACCURACY OF RADAR EQUIPMENT WHICH PURPORTEDLY ALLOWED THE GOVERNMENT TO ESTABLISH THAT AN UNKNOWN AIRCRAFT HAD BEEN SIGHTED SOME 27 MILES SOUTH OF THE UNITED STATES-MEXICAN BORDER, HEADING TOWARD THE UNITED STATES, (ALTHOUGH NO EVIDENCE WAS PROFFERED TO ESTABLISH THAT THE AIRCRAFT HAD EVER LANDED IN MEXICO), WHERE IT WAS CRITICAL FOR THE GOVERMENT TO ATTEMPT TO JUSTIFY A "CUSTOMS SEARCH" OF TWO (2) VANS WHO HAD CONTACT WITH THE AIRCRAFT SOME 300 MILES NORTH OF THE UNITED STATES-MEXICAN BORDER, WITHIN THE MEANING OF **UNITED STATES V. OATES**, 560 F. 2D 45 (2D CIR. 1977); **U.S. V. RUFFIN**, 575 F. 2D 346 (2D CIR. 1977); **U.S.A. V. DIOGUARDI**, 428 F. 2D 1033 (2D CIR. 1970), AND **U.S.A. V. CEPEDA-PENES**, 577 F. 2D 754 (1ST CIR. 1978).

United States Circuit Court of Appeal authority holds that the Government, when challenged as to the accuracy of any scientific devices upon which it relies

for key substantial evidence, must provide the foundation and basis for that scientific equipment and devices. In **United States v. Oates**, 560 F. 2d 45 (2d Cir. 1977), the court held at pages 72-73, fn. 30:

". . . However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Although we stress that it was through no fault of his own, the Assistant United States Attorney did not in advance of trial inform his adversary of the government's intention to offer the hearsay statements of the chemist Weinberg. Furthermore, our review of the relevant portions of the transcript, see e.g., Tr. at 449, leaves the distinct impression that prior to the calling of witness Harrington to the stand, the defense was unaware that the chemist's report and worksheet would be offered in lieu of the testimony of Weinberg himself. In other words, not only did the defense not recieve notice in advance of trial, it did not recieve any notice at all until the actual appearance of witness Harrington in the late afternoon of the fourth day of trial. . . "

Plainly the Government must, per the foregoing

authority give advance notice of the fact that it intends to present scientific data or information in their case and must then present the requisite live witnesses for confrontation or cross-examination once challenge has been made to the accuracy of their scientific information.

Moreover, apparently the Government was not here taken by surprise as to the necessity of providing the foundational evidence for its case in chief literally commenced with the radar detection allegedly 27 miles South of the Mexican Border of the aircraft, and the Government surely was placed on notice that its case depended upon, at least, the showing that a "Customs Search" would be attempted justification, which necessitated proving that the radar equipment was functioning properly and was capable of accurately detecting aircraft "27 miles South of the Border". Having failed to do this, Petitioner Ellis' conviction must be reversed. In general, the admission of the evidence of the radar equipment foundation is governed by Federal Rules of Evidence 803(6) and 803(8). Clearly, however, the Government must satisfy the Confrontation Clause of the Sixth (6th) Amendment in its proffering of the foundational evidence and quite evidently here they did not do so. The following authorities and argument make plain that this conviction must be reversed. **United States v. Oates**, 560 F. 2d 45 (2d Cir. 1977); **United States v. Ruffin**, 575 F. 2d 346 (2dCir. 1977);

United States v. Dioguardi, 478 F. 2d 1033 (2d Cir 1970); and **United States v. Cepeda-Penes**, 577 F. 2d 754 (1st Cir. 1978).

CONCLUSIONS

For each of the foregoing Reasons, Issues and Questions on Appeal, and for the Points and Authorities and Arguments submitted, the Conviction of the Petitioner Richard Lloyd Ellis must be reversed, and Certiorari should be granted.

Dated this 20th day of January, 1980 at Santa Ana, California, 92701.

Respectfully Submitted

Roger S. Hanson
Member of the Bar
U.S. Supreme Court
Attorney for Petitioner
Richard Lloyd Ellis

FILED
DEC. 26, 1979
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

NO. 78-3251

MEMORANDUM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD LLOYD ELLIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California

Before: MERRILL and SNEED, Circuit Judges, and ZIRPOLI, District Judge.

Ellis was convicted of possession of marijuana with intent to distribute, a violation of 21 U.S.C. § 841. He appeals, contending that the government seized his marijuana in an illegal search.

At 9:30 p.m. on June 24, 1977, Rodney Moore, a radar operator with the United States Customs Service in Lancaster, California, spotted an airplane about 25 miles south of the United States-Mexico border flying north toward California. Moore determined that the flight was unscheduled, and when the plane did not land at the border to clear customs, Moore notified a customs plane to follow the "target" plane. The target plane flew without navigational lights until it landed on a dirt airstrip in Kings County at 12:15 a.m. Using infrared equipment, the customs plane observed two pickup trucks without headlights meet the plane. After about fifteen minutes the plane took off without lights and the trucks departed. The trucks drove about 10 m.p.h. without lights for more than an hour, accelerating and turning on their lights when they crossed an interstate highway.

The customs plane kept the trucks under constant observation while other agents radioed Joe Casillas, a Kings County deputy sheriff, to stop the trucks. He stopped Ellis, but the other truck sped away. Casillas drew his gun and held Ellis until his sergeant handcuffed Ellis to await the arrival of customs agent Charles Gould from San Francisco. When Gould arrived twenty to thirty minutes later, he detected the smell of marijuana around the truck and, shining his flashlight through the back window, he saw several large bales inside. Gould then searched the truck, discovered 35 bales of marijuana, and arrested Ellis.

Gould could search Ellis' truck without probable cause for a customs violation if the customs agents were reasonably certain that the target plane had smuggled parcels across the border and someone had placed those parcels in Ellis' truck, even though the transfer to Ellis' truck took place in the United States. **United States v. Markham**, 440 F. 2d 1119, 1121-22 (9th Cir. 1971), **United States v. Weil**, 432 F. 2d 1320, 1323 (9th Cir. 1970), **cert. denied**, 401 U.S. 947 (1971). Undoubtedly the agents could be reasonably certain that a customs violation had occurred in circumstances such as these.[1] That the transfer took place at the "functional equivalent" of the border is further grounds for a search without probable cause. **Almeida-Sanchez v. United States**, 413 U.S. 266 (1973).

Alternatively, we find that there was probable cause for search, and that exigent circumstances existed sufficient to justify proceeding without a warrant. **See United States v. Curtis**, 562 F. 2d 1153

1. Ellis contends that the trial court erred in admitting Moore's testimony because, having testified to radar sightings of the target plane, the government failed to prove the accuracy of his radar equipment as it was required to do. He argues that without Moore's testimony the government did not prove that the target plane crossed the border. The government answers that Moore's testimony was admissible as expert opinion that the plane crossed the border, Fed. R. Evid. 702, and that radar sightings themselves need not be admissible, Rule 703. The government was not required to prove that the plane in fact crossed the border, only that the customs agents were reasonably certain that it had. Therefore, Moore's testimony was admissible not for its truth but because it illustrated the customs agents' reasonable belief.

(9th Cir. 1977), **cert. denied**, 439 U.S. 910 (1978), and **United States v. Coplen**, 541 F. 2d 211 (9th Cir. 1976), **cert. denied**, 429 U.S. 1073 (1977).

Ellis contends that deputy sheriff Casillas arrested him without probable cause, and that the marijuana should be suppressed as the product of an illegal arrest. This was not, however, a search incident to arrest. Agent Gould conducted a valid search, and the alleged illegal arrest does not make it not so.

Affirmed

PROOF OF SERVICE

State of California)
ss
County of Riverside)

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action; My business address is 1509 N. Main, Santa Ana, California 92701.

I served the within PRTITION FOR WRIT OF CERTIORARI ON the interested parties in said action, by placing a true copy in each of four sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

U.S. Solicitor General
Department of Justice
Washington, D.C. 20530

U.S. Attorney
Eastern District of California
U.S. Court House
1130 "O" Street
Fresno, California

U.S. District Judge
Myron D. Crocker
U.S. Court House
1130 "O" Street
Fresno, California 93721

Federal Aviation Administration
Attn: Frederick C. Woodruff, Esq.
1500 Aviation Blvd.
Lawndale, California 90261

I CERTIFY under penalty of perjury that the foregoing is true and correct. Excuted on January 24, 1980 at Santa Ana, California

JACK GALLAGHER